No. 14645

United States Court of Appeals

For the Ninth Circuit

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants,*

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING, EDGAR L. PEECHER, WILLIAM E. BARQUIST and NORMAN L. BUNKER, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

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Appellants have no further comments to make with respect to Kadlec; therefore our remarks are directed to the remaining appellees.

Each authority in appellees' brief has been examined with utmost care as related to the transcript, the exhibits, and the arguments and authorities in the opening brief of appellants.

JURISDICTION

Each of the appellees testified that he thought he had been defrauded. The appellants had no reason to initiate this issue for it was agreed that the mortgage was valid. The issue of deceit arose from the appellees' replies (Tr. 52, 54, 57, 59) wherein they claimed the share

contracts had been exacted through Tobin's misrepresentations. The Silver Spray was impounded *in rem* in admiralty without prepayment of costs on Lower's assertion that the suit was for wages. At the trial he and the other appellees testified no wages were due; they had so declared in their replies. Thus at the outset we find the *in rem* jurisdiction tampered with without just cause.

The final and conclusive lack of jurisdiction is shown by the testimony of all appellees that they were defrauded and sued to get their money back.

The only answer of appellees (Appellees' Brief, 20 and footnote) is the assertion that their *proctors* did not claim the suits were in fact for fraud and deceit. In effect they argue that appellees' own conception of the nature of the litigation must be ignored. Counsel declares he can find nothing in the record, though we have referred to and analyzed the testimony (Tr. 122, 123, 158, 178, 203, 212). In addition to the foregoing references Lower testified (Tr. 120):

> "Q. You wanted your $2500.00 back? Correct?
>
> A. Yes.
>
> Q. And isn't that the reason you saw counsel about bringing this suit? A. Yes.
>
> Mr. Collins: That is all."

Appellees refused to perform the share contracts and disavowed them on the grounds of fraud and false representations. Upon disavowal the remedy was against Tobin for fraud at common law. These remedies are still available.

DAMAGES

Mr. Hervey Petrich testified that he had no knowledge of the earning capacity of a jig or troller like the Silver Spray and his testimony only referred to large tuna clippers. On being handed a photograph by the trial judge he immediately exclaimed (Tr. 188):

> "Witness: This vessel is no bait boat. This is a jig boat or trolling boat. Well, we are or have been talking about bait boats.
>
> Q. (By Mr. Carey): What you have been testifying about throughout were the regular tuna schooners built for the tuna service and you haven't been talking about jig fishing at all?
>
> A. No."

Mr. Petrich repeats (Tr. 189) that all his evidence related to the capacity of a bait boat and had no relation to a jig boat as shown in the photograph.

Appellees introduced no evidence on a prospective catch of a small capacity three-man troller. Argumentation cannot be substituted for evidence. Nevertheless on page eleven of brief of appellees we find this statement: "Following is a summary of evidence as to the prospective tuna catch of the Silver Spray, had her owner carried out his agreement with the crew."

This phase of appellees' argument is built upon one speculation after another: if the District Court had admiralty jurisdiction; if the Silver Spray had an established tonnage; if counsel's computations were correct, there being none by the District Court; if the vessel were built like a large tuna clipper; if Tobin had a contract with Van Camp; if Tobin, rather than Lower,

Peecher and Barquist had terminated the voyage before it began; if there had been no attachment; if appellees had substantial past tuna experience to match that of Mr. Petrich; and if speculative damages could be reasonably ascertained, then and only upon *proof of all* such eventualities, the appellees might have claims for damages for loss of the catch. But even so. their claims cannot be lienable *in rem,* but only as claims *in personam.*

APPELLEES' CLAIMS ARE NOT LIENS

Quare: *Is there a lien against a vessel for fish that have not been caught, particularly after formal seizure?*

The fishing industry is vitally concerned with the answer to this question.

On page twenty-two of brief of appellees, we note this heading: "Judicial attachment does not defeat a seaman's lien for damages from wrongful discharge." They cite no authority to sustain such a lien for speculative shares after seizure. The appellees go to great lengths to analyze the various methods of computing damages. We can only reply to the authorities offered and realize the majority of cases they cite are to support their several theories on damages and none are quoted to sustain the proposition that fishermen have liens against a vessel for speculative shares where the season had not commenced, and particularly for shares that might have been earned after seizure.

Appellees' decisions fall into five categories:

1. Seamen have a lien for wages or shares that *had been earned* but not paid:

The Hudson (SDNY) 1846, 12 Fed. Cas. No. 6,831;

The Grace Darling (D. Me.) 1878, 10 Fed. Cas. No. 5,651;

The Great Canton (EDNY) 1924, 299 Fed. 953.

2. Upon wrongful discharge, the crew may recover *in personam*:

Fee v. Orient Fertilizing Co. (EDNY) 1888, 36 Fed. 509;

The Page (D. Cal.) 1878, 18 Fed. Cas. No. 10,660.

In the second case, the court observes that inefficient and inexperienced fishermen are not permitted to base any kind of a claim on a full cargo of fish.

United States v. Laflin (9th Cir., 1928) 24 F.2d 683, involves nothing more than a suit against the government for damages for breaking up a whaling voyage.

3. Where the seine is damaged in collision cases involving maritime *torts,* the crew may have a lien against the offending vessel during the time necessary to repair or replace the seine:

The Columbia (EDNY) 1877, 6 Fed. Cas. No. 3,035;

The Mary Steele (D. Mass.) 1874, 16 Fed. Cas. No. 9,226;

Carbone v. Ursich (9th Cir. 1953) 209 F.2d 178;

Van Camp Sea Food Co. v. DiLeva, 9th Cir., 1948, 171 F.2d 454.

It is interesting to observe that in these cases the *tort* liability was not denied, though the measure of

damages was questioned. The real issue in these cases is whether it is for the crew or the owner to institute the proceedings.

4. Specific wage contracts are being enforced:

The Lakeport (WDNY) 1926, 15 F.(2d) 575;

The Heroe (D. Dela.) 1884, 21 Fed. 525;

The Wanderer (C.C., D. La., 1880) 20 Fed. 655.

In principle, appellees' case of *Gaynor v. The New Orleans* (N.D. Cal., 1944) 54 F.Supp. 25, 18 is the same. The libel was based on a written agreement between seamen and San Francisco Bay ferryboat owners that the opening of the new bridges would terminate ferry service and upon those events the seamen would receive dismissal benefits. Thus when the ferries stopped the benefits were earned and became payable.

Archawski v. Hanioti (SDNY, 1955) 129 F.Supp. 410, only holds that the owner may be held personally liable in admiralty for the enforcement of contracts of affreightment.

5. Fishermen who were wrongfully discharged or severed from the vessel through injuries, may lien the vessel for shares providing the vessel continues with the voyage, catches fish, and the shares have been, or may be, computed:

Mason v. Evanisevich (9th Cir., 1942) 131 F. (2d) 858;

The American Beauty (W.D. Wash., 1924) 295 Fed. 513;

The Montague (W.D. Wash., 1943) 53 F.Supp. 548.

CONCLUSION

As noted in our opening brief, appellants' authorities cannot be answered. In effect the District Court concluded that *Old Point Fish Co., Inc. v. Haywood* (4 Cir. 1940) 109 F.(2d) 703, governed the case. The entire field of admiralty law cannot be overcome by Judge Parker's dissenting opinion. But the appellees have nothing else to rely on. Actually the dissent is not applicable for Judge Parker was not confronted with the innocent holders of a valid first preferred marine mortgage. Rather, he was simply weighing the equities between the repairmen and the seamen as disclosed at the end of his opinion on page 708, where he says that the repairmen should be charged with direct knowledge of the seamen's plight.

The appellees find themselves in an unfortunate situation but they are not without their remedies: they may press Tobin for their investments, which obviously they thought they were doing when the respective libels were filed.

Respectfully submitted,

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PEYSER, CARTANO, BOTZER & CHAPMAN,
Proctors for Appellants.